

Message

---

**From:** Dean, Abigail [Dean.Abigail@epa.gov]  
**Sent:** 1/14/2021 6:26:47 PM  
**To:** Koslow, Karin [Koslow.Karin@epa.gov]; Wilwerding, Joseph [Wilwerding.Joseph@epa.gov]  
**CC:** Kelley, Rosemarie [Kelley.Rosemarie@epa.gov]; Denton, Loren [Denton.Loren@epa.gov]; Bohan, Suzanne [bohan.suzanne@epa.gov]; Schefski, Kenneth [Schefski.Kenneth@epa.gov]  
**Subject:** RE: Final DOJ Mitigation memo

Thanks, Karin. We will send it around in case there are folks who don't have it yet.

Best,  
Abby

Abigail Dean  
OECA Lead Region Coordinator  
Senior Assistant Regional Counsel | Office of Regional Counsel | Regulatory Enforcement Section  
Environmental Protection Agency Region 8 | 1595 Wynkoop St. | Mail Code: 8ORC-R | Denver, CO 80202  
Office: (303) 312-6106  
Cell: (720) 498-0326

---

**From:** Koslow, Karin <Koslow.Karin@epa.gov>  
**Sent:** Thursday, January 14, 2021 11:16 AM  
**To:** Dean, Abigail <Dean.Abigail@epa.gov>; Wilwerding, Joseph <Wilwerding.Joseph@epa.gov>  
**Cc:** Kelley, Rosemarie <Kelley.Rosemarie@epa.gov>; Denton, Loren <Denton.Loren@epa.gov>; Bohan, Suzanne <bohan.suzanne@epa.gov>; Schefski, Kenneth <Schefski.Kenneth@epa.gov>  
**Subject:** FW: Final DOJ Mitigation memo

Abby – here's the memo we are discussing now (w/DOJ) – if you'd like to distribute to regions.

Thanks,  
Karin

Karin Koslow  
Deputy Director, Office of Civil Enforcement  
Office of Enforcement and Compliance Assurance  
U.S. Environmental Protection Agency  
Desk: (202) 564-0171  
Cell: (202) 716-5645  
WJC South Room 3142D

---

# Environment & Energy Report

## Justice Department Memo Targets Mitigation in Environment Cases

The Trump administration is limiting the inclusion of certain mitigation requirements in environmental enforcement cases, building on other Justice Department moves to set constraints on settlements.

Assistant Attorney General Jeffrey Bossert Clark issued a memo Tuesday, requiring lawyers in the Environment and Natural Resources Division to include “equitable mitigation” relief in settlements only after considering a set of precautions “to ensure that our civil enforcement actions do not overstep the bounds set by Congress.”

Equitable mitigation refers to Justice Department lawyers’ practice of asking courts to force companies to remedy alleged violations by offsetting related environmental harms. It’s a form of relief often included in environmental settlements.

Clark’s policy is cause for “significant concern,” said Lois Schiffer, who led ENRD during the Clinton administration. “But this is all going to be revisited when he leaves, which is imminent.”

The incoming Biden administration is expected to review this and other Clark policies as soon as new political officials are installed. The president-elect hasn’t yet announced a nominee to lead ENRD.

### ‘Not a Blank Check’

Clark’s memo acknowledges courts’ power to order equitable relief, but says it’s “not a blank check.”

He cautioned attorneys in the environment division to weigh certain factors when considering such relief: that there’s a strong legal basis for mitigation; that there’s a geographic connection between a mitigation project and harm caused by a violation; that a project’s costs don’t outweigh its benefits; and that monetary penalties are still the first and primary form of relief sought.

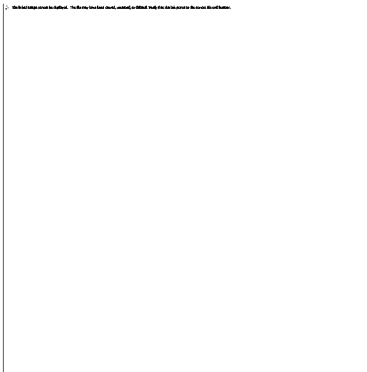
The directive builds upon Clark’s 2018 memo barring the use of “supplemental environmental projects” in settlements. SEPs, unlike mitigation, are voluntary efforts alleged violators can take to benefit the environment—sometimes in exchange for lower fines. But the projects often don’t have as close a connection to the alleged violations as equitable mitigation relief.

"The exact line between permissible mitigation relief and illegal SEPs can be difficult to trace," Clark wrote.

Sidley Austin LLP lawyer David Buente said this week's memo "is kind of like the other shoe falling."

"The memo, if it's implemented, will undoubtedly lead to it being used in fewer cases," he said of equitable mitigation. "It will lead to a narrowing of it, but it's not prohibiting it altogether."

[READ MORE](#)



1801 South Bell Street, Arlington, VA 22202

Copyright 2020 The Bureau of National Affairs, Inc. and Bloomberg LP



[Manage Your Subscriptions](#)

[Contact Us](#)

[Privacy Policy](#)

[Terms of Service](#)